83-2156

CASE NO. _____

In The Supreme Court of the United States

OCTOBER TERM, 1983

DONALD L. PLOTNICK,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. IS AN ACCUSED DEPRIVED OF A FAIR TRIAL, AND ENTITLED TO A NEW TRIAL, WHERE THE RECORD CLEARLY AND CONCLUSIVELY DEMONSTRATES THAT THE STATE KNOWINGLY, RECKLESSLY, OR NEGLIGENTLY ALLOWED FALSE, PERJURED TESTIMONY TO BE RECEIVED UNCONTROVERTED AND SUCH FALSE TESTIMONY (OR NON-DISCLOSURE) COULD, IN ANY REASONABLE LIKELIHOOD, HAVE AFFECTED THE JURY'S ASSESSMENT OF CREDIBILITY?

II. IS AN ACCUSED DEPRIVED OF A FULL AND FAIR CONSIDERATION OF HIS MOTION FOR NEW TRIAL WHEN THE TRIAL COURT MAKES A FINDING OF A MATERIAL FACT WHICH HAS ABSOLUTELY NO SUPPORT FROM A REASONABLE REVIEW OF THE COMPLETE RECORD?

PARTIES

The petitioner in this action is Donald L. Plotnick. The respondent is the State of Ohio.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DONALD L. PLOTNICK,

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Franklin County Court of Appeals is unreported and is attached in the Appendix (A-3). The entry of the Supreme Court of Ohio, dismissing the appeal for lack of a substantial constitutional question, is attached in the Appendix (A-13). The entry of the Supreme Court of Ohio denying Petitioner's motion for rehearing is attached in the Appendix (A-15).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 4, 1984. A timely motion for rehearing was denied on May 2, 1984, and this petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Donald L. Plotnick, was convicted of aggravated arson and extortion in the Franklin County Court of Common Pleas on April 29, 1982, on the theory that he participated in the burning of one Larry King for the purpose of collecting money owed to a co-defendant

as a drug debt. At the trial, Larry King testified that the petitioner was not involved in the assault against him. He further testified that he was not involved in drug dealing.

In an attempt to discredit King, who was called as a Court's witness, the State called Roger Smith to testify. He was presented merely as an employee of the co-defendant in question, Steve Cubberly, who had a legitimate bakery business. He was later shown to be a police informant.

Smith testified at trial that approximately one month prior to the burning incident, Cubberly had sent him to King's residence to collect $208,000.00 from a marijuana debt. King had denied owing a marijuana debt in his trial testimony. Smith testified that King told him at this time that he had fronted the marijuana to others and could not collect the money.

At the hearing on the motion for new trial, however, Smith changed his version of this incident and claimed that he actually never did talk to King at King's residence. He further testified that the prosecutors were well aware of "what really did happen" by way of an interview with him at the prosecutor's office on January 22, 1982. The prosecutor's notes of this interview, introduced at the hearing on the motion for new trial, confirm their awareness at the time of the trial of this conflicting version of Smith's trip to King's residence. This conflicting version was never revealed to the defense.

Smith testified at the hearing on the motion for new trial that a month or so before the burning incident, Cubberly had informed Smith that he was feeling pressure from his New York drug source to pay a drug debt

he owed and that Smith should tell King that guys would be coming from New York to enforce the debt King owed Cubberly. In Smith's trial testimony, no mention was made of the New York threats. In fact, the prosecutor's notes, which showed the sequence of questions that were prepared for Smith on direct examination, reveal a careful skirting of any possible revelation of the New York threat. In discussing this issue further, at the hearing on the motion for new trial, Smith testified that Cubberly told him that the New York threat was just a ruse and that he would have "local enforcers" take care of King and the debt problem.

The Trial Court, in overruling the motion for new trial, found that the new evidence actually identified the petitioner and another as the "local enforcers", thereby causing the new evidence to be detrimental to the petitioner and, therefore, not available as grounds for a new trial. Close scrutiny of the record finds not one scintilla of evidence which could possibly give rise to this conclusion.

The testimony and police reports concerning threats emanating from New York were particularly relevant as they corroborated petitioner's trial testimony that two men from New York whom he had seen in Columbus on the night of the incident were the probable offenders. Unfortunately, the jury was deprived of any knowledge of the New York threat by the carefully planned questioning of Smith by the prosecutors at trial. Petitioner was likewise deprived of this evidence even though discovery of favorable evidence had been timely requested.

King was allegedly set on fire while he was a passenger in a limousine leased to Cubberly by one Kevin Miles who owned a limousine rental service. Although Miles usually provided drivers to Cubberly, at times Smith would drive the limousine.

Miles was a very important witness for the State as he testified that the petitioner had "bought off" King and had tried to silence his employee who was the driver of the limousine on the night in question. This employee was not, however, in the limousine at the time of the alleged burning incident.

As part of his trial testimony, Smith claimed to have never driven Kevin Miles around in the limousine. However, evidence adduced at a motion for new trial showed that Smith perjured himself in regards to this question. It seems he had driven Cubberly and Miles from Memphis, Tennessee to Columbus, Ohio over a two week period while they stopped at all the gay bars between the two locations, establishing a homosexual relationship between Cubberly and Miles. Miles had repeatedly denied homosexual activity and denied any sexual activity with Cubberly.

Comparing Smith's trial testimony to his testimony at the hearing on the motion for new trial, it is conclusively shown that Smith and Miles perjured themselves at the trial. The record further establishes conclusively that the prosecutors were aware of this perjury as it occurred and elected to remain mute on the subject.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, DEALING WITH THE SERIOUS ISSUE OF THE KNOWING USE BY THE STATE OF FALSE TESTIMONY, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Since the record of this case demonstrates conclusively that the prosecution knowingly, recklessly or negligently used false evidence (Smith's false testimony concerning his visit to Larry King), and that the prosecution sat idly by and permitted Smith to testify falsely on cross-examination (testimony about driving Miles around), the only question that remains is the effect of the prosecutorial misconduct.

Assuming that the Trial Court was correct in allowing Smith to impeach King concerning the marijuana deal, if Smith would have testified in accordance with what he states is the real truth as known by the prosecutors before trial, the two-edged sword would have cut deeply into the State's case. Smith would have testified, in order to impeach King, that he knew King was involved in marijuana traffic because he heard Cubberly warn King that if he didn't have the money in 30 days "a couple of guys from New York was coming in, and they were going to collect. And they weren't going to be very nice, this type of thing. It was a threat." (M.H.19). Certainly this information could reasonably affect the jury's assessment of the facts since this warning was given approximately one month before King was set on fire by a couple of unidentified men.

Likewise, when the prosecutors sat idly by and allowed Smith to testify falsely concerning Miles, the petitioner was materially prejudiced. Miles was a critical witness. He claimed the petitioner made very damaging admissions to him and that the petitioner had "bought off" the victim.

The Court of Appeals relied heavily on Miles' testimony as being a matter of weight and credibility for the jury when it affirmed petitioner's trial conviction. (That decision is part of the record in the original appeal.)

Not only would Smith's truthful testimony cast serious doubt on Miles' testimony, it also would have raised questions of motive and bias in that witness' testimony. Once again, the truth would have affected the jury's assessment of credibility.

The most recent United States Supreme Court decision to address this issue is *United States v. Agurs,* 427 U.S. 97 (1976). That decision held, *inter alia,* that it consistently ruled that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Agurs,* at 103. Also see, *Mooney v. Holohan,* 294 U.S. 103 (1935); *Pyle v. Kansas,* 317 U.S. 213 (1942); *Alcorta v. Texas,* 355 U.S. 27 (1957); *Napue v. Illinois,* 360 U.S. 264 (1959); *Miller v. Pate,* 386 U.S. 1 (1967); and *Giglio v. United States,* 405 U.S. 150 (1972).

The *Agurs* Court went on to state that the above line of cases set a strict standard of materiality, not just because they involve prosecutorial misconduct, but

more importantly because they involve a corruption of the truth-seeking function of the trial process. *Agurs,* at 104.

This principle announced in *Agurs* is not new. In *Giglio v. United States,* 405 U.S. 150 at 153 (1972), that Court made it clear that the deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.

The Trial Court held that, in evaluating the evidence before it, a new trial would be ordered only if that evidence would have created a reasonable doubt of guilt that did not otherwise exist. The Trial Court clearly used the wrong standard in evaluating the evidence. The correct standard is set out in *United States v. Agurs, supra.*

In a case similar to the one at bar, the Ninth Circuit Federal Court of Appeals applied *Agurs* to the case before it and held:

> The district court concluded that the nondisclosure . . . would not have affected the verdict. That is not the correct standard.
>
> When the government permits a witness to parade himself in false colors, and the truth is discovered, the motion for a new trial should be granted if the false testimony (or nondisclosure) could, in any reasonable likelihood, have affected the judgment of jury . . . a new trial is required whenever nondisclosure *might*

> *have affected* the jury's assessment of credibility.
>
> *United States v. Butler,* 567 F.2d 885 at 891 (9th Cir. 1978). (Emphasis added.)

There can be no question that, in the case at bar, the false testimony affected the credibility of Mr. Smith, Mr. King and Mr. Miles. The Supreme Court addressed that issue twenty-five (25) years ago.

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides,* 1 N.Y. 2d 554, 557; 136 N.E. 2d 853, 854-855; 154 N.Y. 2d 885, 887:
>
> > 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its

> subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'
>
> *Napue v. Illinois,* 360 U.S. 264, 269-270 (1959).

And if the State should suggest that Mr. Miles' credibility was drawn into question from other sources within the trial, that same *Napue* Court went on to say at 270:

> *Second,* we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.

There can be no dispute that the prosecutors sat quietly and let Smith testify falsely during cross-examination.

As stated in 1967, and still applicable today, the United States Supreme Court held:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here." (Citations omitted.)
>
> [*Miller v. Pate,* 386 U.S. 1 at 7 (1967).]

Such conduct by the State of Ohio and its agents is ample justification for the granting of certiorari to review the judgment below.

II. A FINDING OF FACT BY THE TRIAL COURT FROM A NEW TRIAL MOTION HEARING WHICH HAS NO SUPPORT IN THE EVIDENCE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Due Process requires that a finding of fact be supported in some way by the record before the trier of fact. *Thompson v. Louisville,* 362 U.S. 199 (1960). In this case, the Trial Court found that, by taking Smith's motion testimony and a police document together, the record somehow created a "message of persons answering the descriptions of defendant (Petitioner) and another as local enforcers of the co-defendant's threat to Larry King . . . no facts in the report even vaguely relates to any

fact in the case . . ., nor involves credibility of material witness".

The testimony and police report are simply devoid of any facts, assertions of facts, or suggestion of facts that the petitioner was identified as a local enforcer, and the testimony at the hearing is replete with examples of materiality and credibility.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

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STATE v. PLOTNICK, CASE NO. 83AP-439

Franklin County Court of Appeals, Assignments of Error by Defendant-Petitioner:

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN OVERRULING APPELLANTS MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

(A.) IT WAS PLAIN ERROR FOR THE COURT TO OVERRULE THE MOTION WHEN THE RECORD BEFORE THAT COURT DEMONSTRATED CLEARLY AND CONCLUSIVELY THAT THE STATE KNOWINGLY USED FALSE EVIDENCE, ALLOWED FALSE TESTIMONY TO BE RECEIVED UNCONTROVERTED, AND DELIBERATELY WITHHELD FAVORABLE EVIDENCE FROM THE APPELLANT. SAID CONDUCT DENIED APPELLANT A FAIR TRIAL AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND THE FOURTEENTH, FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(B.) IT WAS ERROR FOR THE COURT TO APPLY THE STANDARD OF CREATING A REASONABLE DOUBT THAT DID NOT OTHERWISE EXIST TO THE MOTION HEARING, HENCE DENYING APPELLANT DUE PROCESS OF LAW AS GUAR-

ANTEED BY THE FOURTEENTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(C.) IT WAS ERROR FOR THE TRIAL COURT TO BASE ITS DECISION ON A FINDING OF FACTS THAT DID NOT EXIST ON THE RECORD, HENCE APPELLANT WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(D.) IT WAS ERROR FOR THE COURT TO ATTEMPT TO APPLY MINIMAL DUE PROCESS REQUIREMENTS TO THE MOTION HEARING WHEN THE OHIO RULES OF CRIMINAL PROCEDURE AFFORD GREATER PROTECTION TO THE APPELLANT.

SECOND ASSIGNMENT OF ERROR:

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,
Plaintiff-Appellee,

v.

Donald L. Plotnick,
Defendant-Appellant.

No. 83AP-439
(REGULAR CALENDAR)

OPINION
Rendered on December 6, 1983

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN C. TRAVIS, for appellee.

MESSRS. SCHWEICKART AND WILLIAMS, MR. GARY M. SCHWEICKART, and MR. LEWIS E. WILLIAMS, JR., for appellant.

APPEAL from the Court of Common Pleas of Franklin County.

NORRIS, J.

Defendant appeals from the overruling of his motion seeking a new trial, and raises two assignments of error:

"1. The trial court erred in overruling appellants motion for a new trial based on newly discovered evidence.

> "2. Appellant was denied effective assistance of counsel as guaranteed by Article I, Section 10 of the Ohio Constitution and the Fourteenth and Sixth Amendments to the United States Constitution."

The motion for new trial was based upon defendant's assertion that subsequent to trial he had discovered evidence which "would probably have changed the result of the trial" since it was "strongly corroborative of the defendant's version" of the case – that the victim, Larry King, had been burned by unknown "enforcers" from New York. The motion was filed pursuant to the provisions of Crim. R. 33(A)(6):

> "RULE 33. New Trial
>
> "(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> " * * *
>
> "(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. * * *"

The newly discovered evidence which defendant maintained was material to his defense was a typewritten "Progress of Investigation" form prepared by a police officer and reporting his interview with an informant, relative to an investigation of defendant's co-defendant, Stephen Cubberly. The report came to the attention of

counsel subsequent to defendant's conviction, when it was brought up at Cubberly's separate trial. The report had not been furnished to defense counsel in response to his discovery request for evidence favorable to defendant.

Defendant contends that the evidence was material to the defense of his case since the report relates that the informant said that he was employed by Cubberly as his driver; that King distributed marijuana for Cubberly; that he was sent by Cubberly to King's house to collect $208,000 owed by King to Cubberly and "to deliver a message to Larry from Cubberly which was if the money wasn't paid in thirty days, that people would come from New York to collect"; that he had seen Cubberly take delivery of marijuana which was in the trunk of a Buick bearing New York license plates and afterwards talked with a tall, 240-pound man with a New York accent; that Cubberly was gay; and that he, Cubberly, and Kevin Miles, the manager of limousine rental service, flew to Memphis, Tennessee to pick up a limousine and that "it took two weeks to return *** due to Cubberly and Miles wanting to stop at all the gay bars on the way***."

The informant, Roger Smith, had been called by the state at defendant's trial as a rebuttal witness, for the apparent purpose of discrediting testimony by King, in which he denied a marijuana debt and asserted that defendant had not participated in the crime. Smith testified that Cubberly had employed him as his chauffeur; that he knew King and was sent by Cubberly to King's residence to collect either $208,000 or marijuana of that value; and that King said that he had "fronted out" the marijuana to others who had not paid him for it. On cross-examination, he was asked if he "drove Kevin Miles around", and Smith answered that he did not.

Defendant asserts that knowledge of the report's existence would have assisted his defense in several respects:

First, counsel would have known that Smith had driven Miles and Cubberly back from Memphis and had seen them frequent gay bars. Miles was an important witness for the state and had denied being a homosexual and being sexually involved with Cubberly. Defendant maintains that the report would have enabled counsel to more effectively cross-examine Smith in an effort to impeach Miles' credibility. Defendant also maintains that the report establishes that Smith lied at trial when he denied that he "drove Kevin Miles around", and that the state knew he was lying and permitted the testimony to stand.

Second, defendant contends that the report tends to corroborate his version that King was burned by enforcers from New York and, had the report been available to him, Smith could have been questioned on that point.

At the hearing on defendant's motion for a new trial, Smith conceded that he was the informant referred to in the report. His testimony at the hearing appears to be at variance, in some minor respects, with his testimony at trial and with the report.

A ruling on a motion for new trial on the ground of newly discovered evidence is within the sound discretion of the trial court, and, in the absence of a clear showing of abuse of that discretion, the ruling will not be disturbed on appeal. *State v. Williams* (1975), 43 Ohio St.2d 88. The standard to be applied by the trial court in consider-

ing a motion for new trial made upon the ground of newly discovered evidence has been clearly set out by our Supreme Court:

> "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) had been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa,* 96 Ohio St., approved and followed.)" [Syllalbus, *State v. Petro* (1947), 148 Ohio St. 505.

The standard to be applied when determining the materiality of undisclosed evidence, in the context of the constitutionally guaranteed right to a fair trial, is whether the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. *United States v. Agurs* (1976), 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342. In view of the burden placed upon the movant by the standard, and the fact that by its very nature impeachment evidence does not go directly to the question of guilt or innocence, as a practical matter, impeachment evidence would need to be unusually persuasive if the burden is to be met when the evidence is considered in the context of the entire record. See *United States v. Agurs, supra.*

The purpose of Smith's trial testimony was to impeach King's credibility. Clearly, to the extent that the evidence proffered by defendant's motion for new trial was directed toward impeaching Smith's credibility, the evidence does not meet the standard. It is not at all clear from the record that any prospective testimony by Smith concerning New York enforcers would be exculpatory since, at the hearing on the motion for new trial, Smith indicated that Cubberly acknowledged that the threat was merely a "scare tactic", and that he really intended to use local people to "get physical" with King.

The effect on the question of defendant's guilt or innocence of testimony by Smith that he drove Cubberly and Miles back from Memphis and saw them go into gay bars, is certainly obscure. Nor are we able to say that Smith's testimony that he had not driven Miles around was clearly inconsistent with his statement as contained in the report that he had driven Miles and Cubberly back from Memphis, when that particular segment of his testimony is considered within the context of his other testimony concerning his having been Cubberly's chauffeur.

Accordingly, we are unable to agree with defendant's contentions that Smith's testimony amounted to the use by the state of false evidence, or that the state deliberately withheld evidence favorable to defendant. In addition, although it may be argued that the trial court exaggerated in characterizing the evidence which lead to its conclusion that the newly discovered evidence was not clearly exculpatory, since its conclusion was supported by evidence in the record we are unable to agree that the trial court abused its discretion in that regard. In view of

the nature of the contents of the report and the discussion above, defendant has not established that he was prejudiced by the state's failure to provide him the report on discovery, even if we are to assume that the request for discovery was adequate to require its production.

In view of the foregoing, the first assignment of error is overruled.

In his second assignment of error, defendant contends that he was denied effective assistance of counsel, if we were to decide this appeal upon the basis that trial counsel failed to make a proper discovery request for the report. Since, as mentioned above, we do not determine this appeal upon that basis, the second assignment of error is overruled.

The assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

WHITESIDE, P.J., and STRAUSBAUGH, J., concur.

STATE v. PLOTNICK, CASE NO. 84-183

Supreme Court of Ohio, Assignments of Error by Defendant-Petitioner:

1. WHEN THE COURT OF APPEALS MAKES AN ORIGINAL FINDING OF FACT IN AN ACTION ORIGINATING IN THE TRIAL COURT THAT SUBSTANTIALLY AFFECTS APPELLANT'S ISSUES, THE SUPREME COURT WILL GRANT REVIEW AS A MATTER OF RIGHT TO THOSE ISSUES AFFECTED.

2. WHEN THE RECORD BEFORE A REVIEWING COURT CREATES A REASONABLE INFERENCE THAT THE STATE KNOWINGLY USED FALSE EVIDENCE AND THE SAME RECORD CLEARLY AND CONCLUSIVELY DEMONSTRATES THAT THE STATE KNOWINGLY, RECKLESSLY, OR NEGLIGENTLY ALLOWED FALSE TESTIMONY TO BE RECEIVED UNCONTROVERTED, A NEW TRIAL MUST BE ORDERED TO PRESERVE THE INTEGRITY OF THE JUDICIAL SYSTEM; AND TO PROTECT THE BASIC RIGHTS OF ALL PEOPLE TO A FAIR TRIAL AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND THE FOURTEENTH, FIFTH AND SIXTH

AMENDMENTS TO THE UNITED STATES CONSTITUTION.

3. WHEN THE RECORD DEMONSTRATES THAT THE STATE PERMITS A WITNESS TO PARADE HIMSELF IN FALSE COLORS, AND THE TRUTH IS DISCOVERED, A MOTION FOR A NEW TRIAL SHOULD BE GRANTED IF THE FALSE TESTIMONY (OR NONDISCLOSURE) COULD, IN ANY REASONABLE LIKELIHOOD, HAVE AFFECTED THE JURY'S ASSESSMENT OF CREDIBILITY.

4. EVEN THOUGH BROAD DISCRETION IS GRANTED TRIAL COURTS TO EVALUATE AND WEIGH EVIDENCE AT A MOTION FOR A NEW TRIAL HEARING, A FINDING OF A MATERIAL FACT MUST HAVE SOME SUPPORT FROM A REASONABLE REVIEW OF THE COMPLETE RECORD IN ORDER TO SATISFY THE DUE PROCESS REQUIREMENT OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

5. THE OHIO RULES OF CRIMINAL PROCEDURE AFFORD BROADER PROTECTION TO A DEFENDANT THAN THE MINIMAL DUE PROCESS REQUIRE-

MENTS OF THE UNITED STATES CONSTITUTION.

6. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,

vs.

Donald L. Plotnick,
Appellant

1984 TERM
To wit: April 4, 1984

No. 84-183

APPEAL FROM THE COURT OF APPEALS
for FRANKLIN County

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this_____day of_____19_____

_____Clerk

_____Deputy

THE SUPREME COURT OF OHIO
COLUMBUS

FRANK D. CELEBREZZE
Chief Justice

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,

vs.

Donald L. Plotnick,
Appellant.

1984 TERM
To Wit: May 2, 1984
Case No. 84-183

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, JAMES WM. KELLY, Clerk of the Supreme Court of the State of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 2nd day of May, 1984.

_____Clerk.

By _____Deputy.

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of June, 1984, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to S. Michael Miller, Franklin County Prosecutor, 369 South High Street, Columbus, Ohio 43215, Counsel for Respondent, State of Ohio. I further certify that all parties required to be served have been served.

GARY M. SCHWEICKART
Counsel of Record

No. 83-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD L. PLOTNICK,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. IS AN ACCUSED AFFORDED A FAIR TRIAL WHERE THE ACCUSED MAKES ONLY A GENERAL NON-SPECIFIC REQUEST FOR DISCOVERY OF FAVORABLE EVIDENCE AND WHERE UPON POST-TRIAL HEARING, SUCH EVIDENCE IS FOUND NOT TO BE EXCULPATORY AND NOT MATERIAL TO THE ISSUE OF GUILT OR PUNISHMENT?

II. IS THE DUE PROCESS CLAUSE SATISFIED WHERE A TRIAL COURT'S DECISION OVERRULING A MOTION FOR NEW TRIAL IS FAIRLY SUPPORTED BY EVIDENCE OF RECORD?

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Case No. 83-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD L. PLOTNICK,
Petitioner,

v.

STATE OF OHIO,
Respondent.

OPINIONS BELOW

The opinions of the Franklin County Court of Appeals and the entry of the Supreme Court of Ohio are adequately set forth in the appendix to the petition. The decision of the Franklin County Common Pleas Court, No. 81CR-10-3653(A), overruling petitioner's motion for new trial is unreported and is set out in the appendix, *infra.*, at page A-1

JURISDICTION

Jurisdiction is adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

Section 1 of the Amendment XIV to the Constitution is adequately set forth in the petition.

STATEMENT OF THE CASE

Respondent believes that petitioner's recitation of the facts of record is inadequate to a determination of the questions presented.

On September 8, 1981, petitioner, Stephen Cubberly and Carl Andrioff attempted to recover a drug debt from Larry King. While doing so, petitioner and his co-defendants poured alcohol on King and set King on fire. Petitioner, Cubberly and Andrioff were charged with aggravated arson and extortion under state penal laws. On April 29, 1982, petitioner was found guilty following a jury trial and his conviction was upheld by state appellate courts.

Petitioner testified at his trial, admitting he was with Cubberly and Andrioff during most of the evening but denying he was present during the time when King was set on fire. Petitioner conceded he had a dinner meeting with his co-defendants and was asked to accompany Cubberly who was attempting to collect a debt owed Cubberly for narcotics. After Cubberly collected monies from one individual, the three stopped at a store where Cubberly purchased two bottles of alcohol. The limousine was then directed to the home of King. (Petitioner asserted that he got out of the limousine before it arrived at King's home.)

King refused to speak with state prosecutors and obtained his own counsel. King was called as a court's witness. Although King denied that petitioner was in the limousine, he recognized Cubberly as one of the three men who demanded money, then doused him with alcohol and set him on fire. He agreed he was screaming while in the limousine. He agreed the three men who came to his home in the limousine were the ones who set him on fire. King was dumped from the car near a supermarket. A nearby resident smothered the flames and called for medical attention.

Gary Wyant was Cubberly's chauffeur throughout the evening that King was burned. Wyant knew each of the men;

petitioner, Cubberly and Andrioff. Wyant drove petitioner, Cubberly and Andrioff from their dinner meeting to the initial drug debt collection point and then to Larry King's home. Petitioner asked King if he (King) had a black suit for a funeral for himself or a member of his family. King entered the limousine. While driving, with petitioner, Cubberly, Andrioff and King in the rear, chauffeur Wyant could hear King screaming loudly that he would obtain the money. Wyant was directed to stop near a supermarket, told to exit and wait, that petitioner and the others would return for him. Petitioner, Cubberly and Andrioff drove off with King in the rear. Nervous, Wyant telephoned his nearby roommate who joined him within five minutes. Shortly, emergency vehicles sped by to the location a block or so away where King was set on fire and thrown out of the limousine.

Within the hour, petitioner, Cubberly and Andrioff returned in another vehicle. Petitioner stated that they had not killed King but he had owed them money. Petitioner then created a false, cover-up story that Wyant and his roommate were to tell police. Petitioner threatened both men with harm if they did not comply. (During his testimony, petitioner admitted he, Cubberly and Andrioff returned and picked up chauffeur Wyant. Petitioner admitted he told both men to tell the false story to police although he denied threatening Wyant and Enderle.)

Wyant appeared at the limousine service offices the next day and announced to manager Kevin Miles that he was quitting. Two police officers were present investigating the crime. Wyant and his roommate both gave statements of what occurred. Petitioner telephoned Miles several times that day, trying to contact chauffeur Wyant. When Miles advised that police had been investigating the crime, petitioner explained what had taken place and stressed that Wyant was to maintain the false story which petitioner devised. The following day petitioner met with Miles and further detailed his involvement in the crime.

Cubberly's former chauffeur Roger Smith testified at trial that in July, 1981, two months before King was burned, Cubberly had sent him to King's house either to collect the money King owed to Cubberly or recover the marijuana. King claimed he did not have the money as he had "fronted" or consigned the marijuana to others. On cross-examination, after describing his duties as chauffeur, driving Cubberly around, Smith was asked if he "... drove Kevin Miles around, also ...." Smith replied that he did not. (Miles was manager of the limousine service from which Cubberly rented a limousine.)

Cubberly's trial was held after that of petitioner. Prior to Cubberly's trial and pursuant to *Kastigar* v. *United States,* 406 U.S. 441 (1972), the state demonstrated that the investigation of Cubberly's narcotics dealings, including the September 8, 1981 burning of Larry King, was complete before Cubberly received a grant of immunity in an unrelated federal prosecution in the State of Washington. *Inter alia,* the state's evidence showed that a month prior to the burning of King, Cubberly's former chauffeur, Roger Smith, had volunteered information to police regarding Cubberly's dealings in narcotics.

Smith's information was included in a progress report of the ongoing police investigation of Cubberly's drug trafficking. The report indicated Smith had been sent to King's house to deliver a message from Cubberly that if King did not pay his debt, people from New York would come to collect. Neither the report nor Smith's trial testimony indicated that Smith actually delivered that message at King's house. The police summary included, *inter alia,* that Smith chauffeured Cubberly around and on one occasion when Miles and Cubberly went out of state to pick up Cubberly's new limousine, Smith drove the two back to Ohio. On the way, Miles and Cubberly stopped at "gay bars".

At petitioner's motion for new trial, Smith explained that he had been sent to King's house on several occasions; that

although he was sent to King's house *to deliver* the message, King was not home at the time. Returning to Cubberly's bakery, he found King present. Cubberly then delivered the threat himself. After King left, Cubberly asked Smith if he knew anyone who could "get physical" with King to collect the debt. When Smith said he did not, Cubberly replied that the threat of persons from New York was merely a scare tactic and that in reality, he had two local people who would "put some muscle on King."

Petitioner filed a motion for new trial claiming that the police summary of Smith's information was exculpatory material under *Brady* v. *Maryland,* 373 U.S. 83 (1963). Applying this Court's decision in *United States* v. *Agurs,* 427 U.S. 97 (1976), the state trial court ruled that petitioner had made only a generalized pretrial discovery request for exculpatory material. The court held that the police report and Smith's information were not exculpatory, not material and did not create a reasonable doubt of petitioner's guilt. The court also held that any discrepancies in the testimony of non-material witnesses would not have created any reasonable doubt of petitioner's guilt.

The intermediate state appellate court affirmed the denial of petitioner's motion for new trial finding any variance in Smith's trial and motion testimony to be minor. Applying the standard of *United States* v. *Agurs, supra.*, the appellate court found the impeachment value of information that Smith drove Miles and Cubberly from Memphis to Ohio and that they entered gay bars "certainly obscure", and that Smith's denial of having driven Miles "around" was not clearly inconsistent when taken in context of his testimony of having been Cubberly's chauffeur. The appellate court rejected petitioner's claim (raised for the first time on appeal) that Smith presented any false evidence. The appellate court also found the trial court's conclusions were supported by evidence in the record.

Further review was denied by the Ohio Supreme Court on April 4, 1984. Rehearing was denied on May 2, 1984.

SUMMARY OF ARGUMENT

The police summary of chauffeur Smith's statements was not exculpatory but inculpatory evidence. The summary did not conflict with Smith's testimony at petitioner's trial or petitioner's motion for new trial. Petitioner's claim, (raised for the first time on appeal), that false testimony was presented at his trial, was rejected by the state courts on a factual finding amply supported by the record.

Petitioner made only a general request for discovery of evidence favorable to petitioner despite the fact that according to petitioner's trial testimony, as early as one hour after the offense, petitioner was aware of his claim that persons from New York were the offenders. Thus, even assuming, *arguendo,* that the police summary were considered to be exculpatory, the evidence did not create a reasonable doubt of guilt which did not otherwise exist. *United States* v. *Agurs,* 427 U.S. 97 (1976).

Petitioner was afforded a fair trial and was found guilty on evidence which proved guilt beyond a reasonable doubt. No exculpatory evidence material to guilt or punishment was withheld from petitioner's trial. No false testimony was presented by any witness for the state. The state court's factual findings are supported by the record.

ARGUMENT

I. THE DECISIONS OF THE STATE COURTS BELOW CORRECTLY APPLIED DECISIONS OF THIS COURT TO THE FACTS OF THE CASE.

Applying the standards of constitutional materiality of evidence announced in *United States* v. *Agurs*, 427 U.S. 97 (1976), the state courts correctly determined that the police summary of investigation was not exculpatory and did not create a reasonable doubt of guilt which otherwise did not exist. This factual finding is supported by the record.

Petitioner's assertion of perjury fails upon examination of the record and was rejected by the state courts below. Witness Smith did *not* testify at petitioner's trial that one month before the crime for which petitioner was convicted, he delivered Cubberly's threat that victim King should pay his debt or face collection by persons from New York. Smith testified that he was sent to collect the money or to recover the drugs. Testimony at trial and upon the motion hearing as well as trial preparation notes of state's counsel made clear that Cubberly sent Smith to collect from or to threaten King on several occasions. The summary of investigation is not inconsistent with Smith's testimony at trial or in the later motion hearing. Consistent with Smith's testimony, the police summary merely recorded that Cubberly sent Smith to King's home "to deliver" the message; not that Smith delivered that message to King.

Petitioner does not reveal to this Court that immediately after Cubberly delivered the threat to King, Cubberly advised Smith that the threat was merely a tactic to frighten King; that Cubberly had two local persons who would act as his collection agents. The report was not exculpatory but inculpatory.

Equally unavailing is petitioner's assertion that during Smith's trial testimony, the prosecution improperly avoided

asking Smith to relate Cubberly's false threat that persons from New York would collect King's drug debt. The exhibits and transcripts before the state trial court on petitioner's motion for new trial demonstrated that the parties litigated the admissibility of a number of co-defendant Cubberly's extrajudicial statements. As the state could not demonstrate the existence of a conspiracy between petitioner and Cubberly at the time Cubberly made the false threat to King, the statement and Cubberly's admission that it was false, was not admissible at petitioner's trial.

Petitioner's assertion that Smith falsely denied acting as chauffeur to limousine service manager Miles is not born out by the record. After being examined by the defense regarding his daily duties as chauffeur for Cubberly, Smith was asked if he "...drove Kevin Miles around, also...." Smith stated he did not. Smith's response was accurate. As chauffeur, Smith daily drove Cubberly "around". He did not drive manager Miles "around". Petitioner asserts that had Smith testified that he once picked up a new limousine with Cubberly and Miles and that during the return trip, Miles and Cubberly stopped in so-called "gay bars", Miles' credibility would have been impeached. Petitioner omits to advise this Court that in fact, Miles did testify at trial that he and Cubberly picked up the limousine out of state and rode back to Columbus together. The police summary does not show that Cubberly and Miles engaged in homosexual acts merely because both entered establishments catering to homosexual clientelle.

Purely impeaching evidence, not concerning a substantive issue, will not be the basis for a new trial unless the defendant can demonstrate that the impeaching evidence probably would result in acquittal. *United States* v. *Anderson,* 574 F. 2d 1347, 1354 (5th Cir., 1978). "...[I]mpeachment evidence can rarely meet this test." *Hughes* v. *Hopper,* 629 F. 2d 1036 at 1038-1039 (5th Cir., 1980), certiorari denied, 450 U.S. 933. See also, *United States* v. *Irvin,* 661 F. 2d 1063 (5th

Cir., 1981); *United States* v. *Magouirk,* 680 F. 2d 108 (11th Cir., 1982). Even assuming, *arguendo,* that Roger Smith made a "false" statement regarding driving Miles "around", false testimony going to credibility of a witness is "material" within the meaning of the rule *only* when the testimony of the given witness may well be determinative of guilt. *United States* v. *Magouirk, supra.,* at 110. See *Giglio* v. *United States,* 405 U.S. 150 (1972).

Moreover, even were the sexual orientation of Miles and Cubberly of more than dubious relevance at trial, it was the subject of lengthy examination by petitioner's counsel and Miles was forced to read his love letter to Cubberly aloud in front of the jury. As Miles readily admitted accompanying Cubberly to Columbus in the new limousine, Smith's statement, even taken out of context as petitioner does, is of no significance at all.

Petitioner's reliance upon *Giglio* v. *United States, supra.,* is misplaced. In *Giglio,* the prosecution's case rested "...almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Ibid.,* 405 U.S. at 154. In contrast, the state's case against appellant rested primarily on the testimony of chauffeur Gary Wyant and his roommate, Paul Enderle. While Miles' testimony had significance in alleging that King would not name petitioner as one of the men who torched him, it was Wyant who placed petitioner with Cubberly and Andrioff throughout the evening from the dinner meeting to the supermarket a block or so and minutes from the torching of King. Enderle corroborated Wyant regarding the cover-up story proposed by petitioner an hour later. Petitioner acknowledged telling Wyant and Enderle to tell a false cover-up story to police. Clearly, the case did not rest "almost entirely" on Kevin Miles.

The within case is controlled by the principles set out in *United States* v. *Agurs,* 427 U.S. 97 (1976). Under *Agurs,* even assuming, *arguendo,* that the progress of investigation

of Cubberly were considered to fall within the rule of *Brady* v. *Maryland,* 373 U.S. 83 (1963), (a position which respondent strenuously disputes), where there is but a general request for "exculpatory material" or "*Brady* material", a new trial is warranted only where the evidence actually creates a reasonable doubt that did not otherwise exist. If the evidence does not create a reasonable doubt, taken in context with the entire record, then a new trial is not appropriate. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense. *Agurs, supra.,* 427 U.S. at 109, 112, note 20.

One who seeks to make a successful *Brady* claim must establish three factors: (1) the prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; (3) the materiality of the suppressed evidence. Applied to the facts of the within appeal, it is clear that petitioner was not entitled to a new trial. First, there was no perjury presented at trial. Second, the evidence of the false threat from Cubberly to King was not exculpatory, but inculpatory, supporting the state's argument that Cubberly did use petitioner Plotnick and co-defendant Andrioff to act as his "local muscle" in collecting drug debts from King. At trial, petitioner admitted knowing of the drug indebtedness, being with Cubberly from a dinner meeting through the first drug debt collection, to the carryout where the alcohol was purchased by Cubberly and after King was set afire. Petitioner agreed that he, Cubberly and Andrioff picked up chauffeur Gary Wyant and his roommate, Paul Enderle after King was burned. Petitioner admitted telling Wyant and Enderle that they should tell a false story to police. Petitioner admitted devising the false story.

Moreover, from his own testimony, petitioner knew of Cubberly's drug dealing with people from New York and the fact of Cubberly's dealing with people from New York was

brought out in the state's case in chief. If there were any truth to his testimony, petitioner certainly knew exactly what his defense would be from the moment he claims he was told by Cubberly that persons from New York burned King. The fact that co-defendant Cubberly obtained his drugs from New York was no secret. Discovery provided to the defense included a transcript of co-defendant Cubberly's statement to Miles that he, Cubberly, was "...involved in multi-million dollar stuff... (and that) there's six guys in there from New York and they're kinda watching everything." The list of potential state's witnesses included the names of Marvin Levi of New York City and Dan Reedy of the New York State Police. Petitioner testified at trial that he knew of Cubberly's drug dealings with people from New York and knew prior to his accompanying Cubberly on the drug debt collections on the evening King was burned that Cubberly was to meet with people from New York.

Thus, had there been any truth to his assertion, petitioner could have made a specific request for exculpatory evidence supporting his theory. Rather, petitioner made only a general request for favorable evidence. This type of request is no better than no request at all. *Agurs, supra.,* at 106-107. A new trial will be awarded only if the evidence not disclosed was first, exculpatory; second, material to guilt or punishment; and third, if presented to the jury, would have created a reasonable doubt of guilt. *Agurs, supra.* The "evidence" in question meets none of these tests.

The state courts correctly applied the relevant decisions of this Court to the facts of this case. Petitioner was afforded a fair trial and was convicted on evidence which proved guilt beyond a reasonable doubt.

II. THE DECISION OF THE STATE TRIAL COURT IS BASED UPON FACTS OF RECORD AND SHOULD BE DEFERRED TO IN THE ABSENCE OF CONVINCING EVIDENCE TO THE CONTRARY.

Petitioner has misstated the findings of the state trial court. Petitioner's quotation from that decision ("...no fact in the report even vaguely related to any fact in the case before the Court, nor involves credibility of material witnesses", Petition, p. 11-12), relates to the findings of the trial court with respect to an event occurring some two to three months prior to the events upon which petitioner was charged. That earlier event, delivery of drugs to co-defendant Cubberly, is not addressed in the petition and no claim of error is based thereon.

The state trial judge did not state that Cubberly's threat to King was a detailed description of petitioner and co-defendant Andrioff as local debt enforcers. Witness Smith had related Cubberly's request for "someone big...that could get physical with him if they had to." The state trial judge was aware that both petitioner and Andrioff fit the general description of being "someone big". Petitioner admitted at his trial that earlier that evening, he and Andrioff went with Cubberly as protection knowing that the trip was to collect a drug debt owed to Cubberly. The trial judge did examine claimed "...discrepancies in the testimony of non-material witnesses as cited by defendant...." but found any such discrepancies did not create any reasonable doubt of guilt. (Decision of trial court, March 29, 1983, Appendix, *infra.*, p. A-2) The state appellate court reached the same conclusion. (Appendix to petition, p. A-8.)

Those findings of historical fact are supported by the record and should be deferred to in the absence of convincing evidence to the contrary. See *Marshall* v. *Lonberger*, ____ U.S. ____, 103 S. Ct. 843, 850 (1983); *Sumner* v. *Mata*, 449 U.S. 539 (1981); *Rushen* v. *Spain*, ____ U.S. ____, 104 S. Ct. 453, 456 (1983) (*per curiam*).

CONCLUSION

Petitioner was fairly tried and convicted upon proof of his guilt beyond a reasonable doubt. No exculpatory evidence was withheld from petitioner and no perjury committed by any witness for respondent. The facts of record do not support petitioner's claims. The state trial court's order denying petitioner's motion for new trial is amply supported by facts of record.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should not issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, the undersigned, a member of the bar of this Court, certifies that the requisite number of copies (3) of the foregoing Brief of Respondent have been served upon petitioner, Donald L. Plotnick, by mailing such copies to the office of petitioner's counsel of record, Gary M. Schweickart, 1243 South High Street, Columbus, Ohio 43206, by U.S. Mail, First Class postage prepaid, this 30th day of July, 1984.

I further certify that all parties required to be served have been served.

ALAN C. TRAVIS
Counsel of Record
for Petitioner

(Clerk's Stamp Omitted)

Court of Common Pleas, Franklin County, Ohio

State of Ohio	:	
Plaintiff	:	
vs.	:	Case No. 81CR-10-3653A
Donald L. Plotnick	:	
Defendant		

DECISION ON MOTION FOR NEW TRIAL

Rendered this 29th day of March, 1983.

GILLIE,

The issue posed by defendant's motion for new trial is materiality of the itmes (*sic*) not furnished by the State to defendant's counsel in discovery prior to trial.

That issue in turn hinges upon the question of whether or not those items of evidence would, in the Court's opinion, have created a reasonable doubt of guilt that did not otherwise exist. (*United States v Alberico* 604 F. 2d 1315 (1979))

The two items whose pre-trial absence from the file of defendant's counsel are the subject of defendant's motion for new trial are two pieces of information which the Court finds are not material to the case at bar, would have in no way aided defendant and could not have created a reasonable doubt of defendant's guilt if furnished to defendant's counsel before trial or presented by anyone to the jury at trial.

The first item refers to a reported delivery of marijuana to a man later named as a co-defendant of the defendant in

this case sometime in June or July, two months before the facts in issue. No fact in the report even vaguely relates to any fact in the case before the Court, nor involves credibility of material witnesses.

The other matter sought to be the basis for necessary discovery would surely have aided the State instead of defendant with its message of persons answering the descriptions of defendant and another as local enforcers of the co-defendant's threat to Larry King.

The Court therefore finds that items not furnished by the State to defendant's counsel in discovery not material as to due process, not such as would be obviously exculpatory to defendant and without the capacity to create or suggest a reasonable doubt of defendant's guilt.

It is further to be noted that defendant's counsel's request for discovery was insufficiently specific to bring the situation within acceptable guidelines set by *United States v Agurs* 427 U.S. 97 (1976) and *United States v Weiner* 578 F. 2d 757 (1978).

Any effect discrepancies in the testimony of non-material witnesses as cited by defendant would not be such as would create a reasonable doubt on defendant's behalf.

Defendant's motion for new trial is overruled.

(signature omitted)

William T. Gillie, Judge

(Appearance of Counsel omitted)